Supreme Court, U.S.
FILED
MAY 3 - 1993
OFFICE OF THE CLERK

No. 92-1484

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SHOWA DENKO K.K.,
Petitioner,

v.

SYLVIA HILL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This case squarely presents the issue that divided the Court in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), namely, whether personal jurisdiction may be established *solely* by placing a product into the stream of commerce and "without the need to show additional conduct by the defendant aimed at the forum state." Pet. App. 3a, 16a. This recurring issue has divided the lower federal and state courts and has substantial practical significance. Respondents micharacterize this Court's decision in *Asahi*, ignore the conflict among the lower courts on the substantial issue presented, and mistakenly suggest that the decision below does not even present the issue left unresolved by *Asahi*.

1. The West Virginia Supreme Court of Appeals could not have been more clear that it was deciding the issue that divided this Court in *Asahi*:

> We conclude that personal jurisdiction "premised on the placement of a product into the Stream of Com-

> merce is consistent with the Due Process Clause," and can be exercised without the need to show additional conduct by the defendant aimed at the forum state.

Pet. App. 15a-16a (quoting *Ashai*, 480 U.S. at 117 (Brennan, J., concurring)). The West Virginia court's own syllabus point 2 (Pet. App. 3a)—which the court approved with its opinion as its holding (Pet. 8 n.2; Pet. App. 18a)—recites precisely this holding, not the proposition suggested by respondents, *see* Br. in Opp. 9.

In *Asahi*, contrary to respondents' suggestion, this Court did not sustain the exercise of personal jurisdiction based solely on placement of an article into the stream of commerce.[1] In fact, this Court has never so held. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). *See also* Pet. 9. The relaxation of the constitutional limitations on personal jurisdiction adopted by the West Virginia court calls for further review.

2. The lower courts are deeply divided over the validity of the stream-of-commerce analysis, and they have not perceived a clear message from the conflicting opinions in *Asahi*. *See* Pet. 9-12. The First, Fourth, Eighth, and Eleventh Circuits have rejected an unadorned stream-of-commerce analysis in light of the opinions in *Asahi*. *See Boit v. Gar-Tec Prods.*, 967 F.2d 671, 681-83 (1st Cir. 1992); *Federal Ins. Co. v. Lake Shore, Inc.*, 886 F.2d 654, 658-59 (4th Cir. 1989); *Falkirk Mining Co. v.*

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[1] Respondents erroneously assert that a majority of this Court held that the stream-of-commerce analysis supported jurisdiction in *Asahi*. Br. in Opp. 8. Justice O'Connor wrote for four Justices concluding that it did not, 480 U.S. at 112, Justice Brennan wrote for four Justices concluding that it did, *id.* at 117, and Justice Stevens concluded that it was not necessary to decide the issue, *id.* at 121.

Japan Steel Works, Ltd., 906 F.2d 369, 376 (8th Cir. 1990); *Bond v. Octagon Process, Inc.*, 926 F.2d 1573, 1573 (11th Cir.), *aff'g* 745 F. Supp. 710, 715 (M.D. Ga. 1990), *cert. denied*, 111 S. Ct. 2855 (1991). The Fifth and Seventh Circuits continue to endorse the theory despite *Asahi*. *See Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 385-86 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946-47 (7th Cir. 1992). Indeed, *Asahi* has led to conflicting opinions even within a *single* court. *Compare Redwine v. Franz Plasser Bahnbaumaschinen Industriegesellschaft, M.B.H.*, 794 F. Supp. 1062, 1065 (D. Kan. 1992) (rejecting stream-of-commerce theory) *with Wessinger v. Vetter Corp.*, 685 F. Supp. 769, 777 (D. Kan. 1987) (embracing stream-of-commerce theory).

Respondents' reliance on *Showa Denko K.K. v. Pangle*, 202 Ga. App. 245, 414 S.E.2d 658 (1991), *cert. denied*, 1992 Ga. LEXIS 188 (Ga. 1992), only serves to underscore the division among the lower courts. In sustaining jurisdiction based on a stream-of-commerce theory, 414 S.E.2d at 662, the *Pangle* court rejected the views of the United States District Court for the Middle District of Georgia in *Bond v. Octagon Process, Inc.*, 745 F. Supp. 710 (M.D. Ga.), *aff'd*, 926 F.2d 1573 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2855 (1991), which had followed Justice O'Connor's plurality opinion in *Asahi* and rejected the stream-of-commerce analysis. In *Pangle*, moreover, the Court of Appeals of Georgia announced, "[j]ust as other courts have done, we conclude the 'splintered view of minimum contacts in *Asahi* provides no clear guidance on this issue'. . . ." 414 S.E.2d at 662 (quoting *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d at 386).

This persistent conflict concerning the validity of the stream-of-commerce theory warrants this Court's review.

3. Nor is it the case, as respondents contend, Br. in Opp. 7, that product liability litigation would be doomed

without the stream-of-commerce theory. This is so because the plaintiff's interest in compensation and the State's interest in deterring the manufacture of unsafe products are served by exercising jurisdiction over downstream manufacturers and sellers who actually serve the market in the forum state, as the opinion of the Court observed in *Asahi*. 480 U.S. at 115.

Moreover, in her concurrence in *Asahi*, Justice O'Connor described the sorts of forum-focused conduct the presence of which, *in addition to* the placement of a product into the stream of commerce, would support the exercise of jurisdiction over upstream parties. *Asahi*, 480 U.S. at 112.[2] The few facts recited by the court below, Pet. App. 11a, 14a, and relied upon by respondents, Br. in Opp. 9-10, do not reflect such forum-focused conduct.[3] Accordingly, the only way the West Virginia court

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[2] Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareneses that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the State.

Asahi, 480 U.S. at 112 (O'Connor, J.).

[3] The court below and respondents take aim at petitioner's ownership of a U.S. subsidiary to which it sold its L-tryptophan. But a parent-subsidiary relationship does not alone establish jurisdictionally significant ties. *See, e.g., Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336-37 (1925); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160-61 (5th Cir. 1983); *Restatement (Second) of Conflict of Laws* § 52, comment b, at 180 (1971). This is particularly relevant here, where the subsidiary, SDA, never sold L-tryptophan to any customers in West Virginia nor made any shipments of L-tryptophan to West Virginia. Pet. App. 24a. Only the stream of commerce connected petitioner with West Virginia.

could sustain jurisdiction in this case was by the holding that court actually adopted, but this Court never has: that placement of a product into the stream of commerce suffices *"without the need to show* additional *conduct* by the defendant *aimed at the forum state."* Pet. App. 3a (emphasis added), 16a (same). This extreme position demands further review by this Court, and this is an appropriate case, with a clear and simple factual record, in which to resolve the issue.

* * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1993